1986

State of Utah v. Todd Emmit Turner and Darin Brent McEwan : Brief of Appellant

Utah Supreme Court

Terry L. Christiansen; Assistant Summit County Attorney; Attorney for Plaintiff/Respondent.
Elliot Levine; Attorney for Defendant/Appellant.

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. TODD EMMIT TURNER and DARIN BRENT McEWAN, Defendants-Appellants.	)	NO. 20920 42

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY

THE HONORABLE J. DENNIS FREDERICK, PRESIDING

TERRY L. CHRISTIANSEN
Asst. Summit County Attorney
Attorney for Plaintiff/Respondent
P.O.B. 128
Coalville, Utah 84017

ELLIOTT LEVINE(USB #1939)
Attorney for Defendant/
Appellant
261 East 300 South
Suite 150
Salt Lake City, Utah 84111

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
vs.	)	
	)	
TODD EMMIT TURNER and DARIN BRENT McEWAN,	)	NO. 20920
	)	
Defendants-Appellants.	)	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Todd Emmit Turner, was charged with the offenses of Burglary (3 counts), in violation of Title 76, Chapter 6, Section 202(1), Utah Code Annotated, 1953, as amended, Second Degree Felonies, and Theft (3 counts), in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated, 1953, as amended, Third Degree Felonies.

DISPOSITION IN THE LOWER COURT

Defendant was tried before a jury and found guilty of all charges, in the Third Judicial District Court, the Honorable J. Dennis Frederick presiding. Sentence of an indeterminate term of from one to fifteen years, on each Burglary count, and from zero to five years on each Theft count, was imposed on September 17, 1985 from which Defendant appealed.

RELIEF SOUGHT ON APPEAL

Defendant seeks an Order of this Court reversing his convictions in the District Court and/or granting a new trial.

STATEMENT OF THE FACTS

Defendant was stopped for a traffic violation while driving down Parley's Canyon, on Interstate 80, toward Salt Lake City late one night. Defendant was the driver of the automobile, which was registered in his wife's name, and co-defendant, Darin Brent McEwan, was the passenger.

Shortly after the vehicle was stopped by the Highway Patrol officer, the passenger, Mr. McEwan, bolted from the scene into the brush along the interstate but was later arrested. The vehicle contained certain items which, the authorities alleged, were stolen from a condominium complex in Park City where Mr. McEwan was employed.

Each of the defendants were arrested and charged with three counts each of Burglary and Theft. As to Appellant, no evidence was adduced at trial placing Appellant at the scene of the alleged thefts and burglaries. Appellants only connection, if any, was that he was, at the time of the traffic stop, in possession of recently stolen goods.

At the conclusion of the jury trial the State requested, and the Court gave, Jury Instructions 17 (T. 167), 18 (T. 168), and 19 (T. 169).

ARGUMENT

POINT I

JURY INSTRUCTION NO. 17 CONTAINED AN UNCONSTITUTIONAL MANDATORY REBUTTABLE PRESUMPTION AND AS SUCH CONSTITUTES REVERSIBLE ERROR

Jury Instruction No. 17 contained the following:

> " A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.
>
> Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property. "

This is the identical jury instruction that this Court declared unconstitutional in the case of STATE v. CHAMBERS, 20 Utah Adv. Rep. 14 (1985).

In the **CHAMBERS** case, this Court, relying on the standards set forth in the cases of SANDSTROM v. MONTANA, 442 U.S. 510 (1979) and FRANCIS v. FRANKLIN, 105 S.Ct. 1965 (1985), held that a jury instruction worded as Jury Instruction No. 17 was worded, constituted the use of an unconstitutional mandatory rebuttable presumption.

It is clear from the record in this present appeal that Jury Instructions 17 and 19 are identical, verbatim, to the jury instructions which this Court declared unconstitutional in the factually similar **CHAMBERS** case cited above.

mandatory rebuttable presumption, and the mandatory presumption in question directly relates to the determination of Appellant's guilt, Appellant is entitled to a reversal of his conviction and/or a new trial.

POINT II

JURY INSTRUCTION NO. 17 IS UNCONSTITUTIONAL BECAUSE IT DIRECTLY RELATES TO THE ISSUE OF GUILT AND RELIEVES THE STATE OF ITS BURDEN OF PROOF

Jury Instruction No. 17, given by the Court at the end of Appellant's trial, uses verbatim the lauguage of U.C.A., 1953, Section 76-6-402(1).

Once again, this Court, in the case of STATE v. CHAMBERS, 20 Utah Adv. Rep. 14 (1985), at 17-18, ruled that a jury instruction identical to Instruction No. 17, which used verbatim the statutory language of 76-6-402(1), was unconstitutional.

The basis for this ruling, espoused by Justice Durham, is that such an instruction, by using the term **prima facie**, shifts the burden of proof to the accused, which, if not sustained by him, requires the verdict to be cast against him. This shifting of the burden to the accused is unconstitutional. STATE v. BARETTA, 47 Utah 479, at 489-90; 155 P 343, at 346-47 (1916).

As such, Defendant is entitled to a reversal of his conviction and/or a new trial.

POINT III

THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY CONVICTION IN THIS CASE.

Defendant contends that because there was no direct evidence placing Defendant in Summit County at the time of the commission of the offenses, there was insufficient evidence upon which a jury could convict.

Defendant concedes that this argument is more forceful as it relates to Appellant's conviction for Burglary than as to Appellant's conviction for Theft, but, even as it relates to theft, there was insufficient evidence to justify conviction for the crimes charged.

CONCLUSION

In light of the foregoing errors of the trial court, and based upon the arguments put forth on each issue, Appellant prays for reversal of his convictions or, in the alternative, for a new trial.

Dated this 24 day of June, 1986.

ELLIOTT LEVINE, Attorney for Appellant

CERTIFICATE OF MAILING

THE UNDERSIGNED certifies that they mailed 4 true and correct copies of the foregoing document, postage prepaid, on this 6th day of June, 1986 to:

TERRY L. CHRISTIANSEN
ASST. SUMMIT COUNTY ATTORNEY
P.O.B. 128
COALVILLE, UT 84017